32.

# AN ACCOUNT

(4)

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At Large of the

RIGHT HONOURABLE

THE

# Earl of Danby's ARGUMENTS

At the COURT of

# KING'S-BENCH

AT

# WESTMINSTER,

Upon his Lordship's Motion for BAIL,

The 27th. day of *May*, *Term. Pasch.* 1682.

Together with the

# JUDGES ANSWERS

AND THE

# EARL'S REPLYES,

As they were then Truly taken.

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*LONDON*,

Printed for *Charles Mearne*, 1682.

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## Upon his Lordſhip's Motion for BAIL,

The 27th. day of *May*, *Term. Paſch.* 1682, *&c.*

IMmediately after his Lordſhip was in Court, the return of the *Habeas Corpus* was read, and Mr. *Sanders* (of Council for his Lordſhip) did move the Court, That whereas in *Eaſter Term* 1681, the Court had diſmiſs'd his Lordſhip with a *Declaration* that they would take into their Conſideration till the *Term* following, what anſwer they would make to what had then been ſaid to them by his Lordſhip and his Council; he therefore moved, That they might now accordingly know the pleaſure of the Court, and that they would be pleaſed to grant Bail to the Earl of *Danby*.

But before the ſaid Mr. *Sanders* could well have pronounced the foregoing words, the Lord Chief Juſtice *Pemberton* did reprimand the ſaid Mr. *Sanders* for having offer'd to impoſe upon the Court what had never been ſaid by them, ſaying, that there was no ſuch thing as their having ſaid at any time that they would take the Earl of *Danby's* Caſe into farther conſideration; for that they had told my Lord of *Danby* the laſt time, that it was not in their power to give him any

Relief at all, and that he therefore wonder'd, and muſt extremely blame Mr. *Sanders* for moving the Court again in a matter to which they had already given ſuch a poſitive Anſwer, and could not but admire, that he ſhould ſo miſinform his Clyent, as to give him any ſuch advice, which could only be to the giving both him and the Court an unneceſſary trouble.

To all which Mr. *Sanders* replyed, that he humbly begg'd his Lordſhip's pardon if he had miſtaken him, for that truly he did underſtand that his Lordſhip had declared that he would take time to conſider of my Lord of *Danby*'s Caſe till the following Term; but that if it was a miſtake, he muſt beg his Lordſhip's pardon, and did believe the reſt of his Brethren took it ſo, as well as himſelf.

The Earl of *Danby* then ſpoke himſelf for about two hours, and ſaid to the Lord Chief Juſtice, that he met with an Objection which he did not expect, and that he muſt beg his Lordſhip's pardon not to let that paſs for a miſtake which his Council had affirm'd, of the Courts having taken time to conſider of his Caſe, till the next Term after that of his Lordſhip's being laſt there; for that his Lordſhip did therein appeal both to the reſt of the Judges which were upon the Bench with him, and to all other perſons whatſoever who were then in Court, whether his Lordſhip had not ſaid that if he (meaning the Earl of *Danby*) pleaſed, they would take time to conſider of his Caſe till the next Term; and he did declare upon his *Honour* that thoſe words had been pronounced to him by my Lord Chief Juſtice himſelf, and that he did then accept it as a favour from the Court, and did return his humble thanks to them for it: In ſo much that his Lordſhip ſaid, that he confeſſed he was very much ſurprized to meet with ſuch an Introduction at the firſt entrance into a matter which he conceived to be of ſo great weight as he doubted not but he ſhould make this Caſe of his appear to be.

But yet that it did give him reaſon to believe that he came with ſome prejudice before his Lordſhip, and that they were ſo much prepoſſeſſed in this matter, that if he did not think every Man in *England* would find that he might be concern'd in what reſolution ſhould be given in this Caſe, as well as himſelf, he ſhould ſcarcely have ventured upon it, though he had lain ſo long under ſo unreaſonable a Confinement as he took himſelf to do; and therefore he muſt deſire their Lordſhips patience and attention to what he had to offer in his own behalf, and (as he believed) in the behalf of the *Liberty of the Subject* in general.

His Lordſhip directing himſelf to the Lord Chief Juſtice, ſaid, It was juſt now a year ſince he was before his Lordſhip in this Court, and that he was aſſured, that his Lordſhip did then pleaſe to tell him that they would take time to the following Term to conſider of what they ſhould think fit to doe in his Lordſhip's Caſe; But he ſaid, that care was then taken the firſt day of that following Term to prevent his coming there, by an *Indictment* which was brought againſt him (*ready*

*out and dry'd*, as he had been told) for his being privy to the Murther of Sir *Edmund-Bury Godfrey*.

He ſaid he did not wonder at it, Becauſe there was nothing ſo *black*, which had not been Invented to be ſaid againſt him, but he confeſſed he did wonder to hear, that ſuch an Evidence of an *Iriſh Papiſt* (who was upon Tryal for his own Life, and upon an *hear-ſay* only) ſhould be believed againſt an *Engliſh Proteſtant*, by a Jury of *Engliſh men*, and ſome of them *Gentlemen*; but yet that that wonder had been much abated, when he heard that the ſame *Foreman* had been as favourable in the Caſe of a *Notorious Murther*, as he had been ready to find that *Murther* againſt him, which had not the leaſt *probability* in it, and which no man could think of with more Deteſtation both of the *Fact*, and of any *Man* that could have an hand in it, than himſelf.

However, this prevented him from coming there again till after notice had been given to Sir *Edmund-Bury Godfrey*'s Brothers, to know if they had any thing further to ſay againſt him on that matter, and that he could get himſelf Diſcharg'd from that *Indictment*, and as to the wretch himſelf *Fitz Harris* (who had accuſed him) he did two days before his Death, ſend the *Miniſter* of the *Tower* to his Lordſhip, to beg of him, that before he died, his Lordſhip would forgive him his having ſworn *falſly* againſt him; and he did confeſs, that he was put upon it to *ſave* his *own* Life, and did ſay by *whom* he was prompted to it; and whether it proceeded from thoſe Men, who might think their Villanies diſcovered, and ſo might fear they could no way be ſafe but by putting that matter yet farther againſt him, or from what other Cauſe his Lordſhip could not tell, but (if his Lordſhip was not miſinformed) he did hear that *ſome* Men were ſtill endeavouring to get ſomething more of the ſame nature to be ſworn againſt him, if they can contrive how to make their forg'd Teſtimonies to agree about it.

He ſaid he thought that time would have tired out the malice of ſuch *Bloud-ſuckers* before now whom he had found ſo buſie, for the firſt year and half after his Impriſonment, that he was not a Week without Endeavours uſed by ſtrange People to get to ſpeak with him, and ſuch as he had reaſon often to ſuſpect to be *Knights of the Poſt*; amongſt whom the ſtory of one *Magrath* (another *Iriſh Man*) he ſaid, was notably remarkable in his endeavour (under pretence of kindneſs) to have made him their *Tool* to prove that Sir *Edmund-Bury Godfrey* had killed himſelf; but he ſaid he had the good fortune immediately to *detect* that Villany, as he hoped yet to live to doe of *ſome* others; but that in the mean time he foreſaw, that he was always to be a particular Object of the malice of ſuch men, ſo long as he was left under this *Confinement*, from which he ſaw no hopes to be relieved but by that Court, where the Law Directs every *Engliſh* man to come for Juſtice, that is oppreſs'd in his Liberty.

He ſaid he hoped his Lordſhip would forgive him for having been a little tedious on that Subject of Sir *Edmund-Bury Godfrey*, becauſe his

his Reputation had been ſo much Expoſed in that particular, and before that Court.

After his diſcharge from that Indictment, he ſaid there ſeemed to be a probability of the Call of a *Parliament* in ſome ſhort time, and whenever he could give himſelf the leaſt hopes of that, he reſolved to trouble no other place; But that now he had not the leaſt proſpect of that kind, and that he had been a Priſoner above three years, and yet could ſafely ſwear, he was without the *knowledge* to that day, for what real Crimes he was Committed; only he knew that the name of *Treaſon* had been laid to his Charge, without ſaying wherein the *Treaſon* conſiſted.

He ſaid he came therefore now to that *Court* (as the only proper place for all Perſons to reſort to for their *Liberty*) and he was ſorry, that he was put to the great diſadvantage of ſpeaking in his own Cauſe, but becauſe he ſaw the laſt time he was there, that ſome fault ſeemed to be found with his Councils, for urging things which ſeemed to relate to matters of *Parliament* (although upon a due conſideration of his requeſt there is nothing in it which does touch their Juriſdiction) he had choſen rather to rely upon the Courts pardoning his defects, than put any further hardſhips upon thoſe Gentlemen who had been his Council, to whom he had been more beholden, than they had been to him; for that they had undergone ſome unheard-of *rebukes* already in *another* place, for offering to be of Council with him (though in matters of Law) which he believed had never been heard of but in his Caſe, and he hoped that (when all his Circumſtances ſhall have been well conſidered) he ſhall be the laſt *Engliſh* man that will ever have ſo many hardſhips put upon him, as will appear to be through every part of his Caſe.

In the firſt place he ſaid, that he had been both Accuſed and Committed, without any *Oath* or *Affidavit* made againſt him, for any *Crime* whatever; Which had been in the Caſe of no other Lord but himſelf, and he did believe of no other Man.

*Secondly*, That there was no particular *Treaſon* mention'd in the *Articles* againſt him, only the word *TRAITEROUSLY* had been applyed to things which were not *Treaſon*, if they had been true (as was then declared by Sir *William Jones* the King's Attorney) and he ſaid, there were good ſtore of Witneſſes to prove, that when it could not be maintained by Argument in the *Houſe of Commons*, that any of the Crimes mention'd againſt him were *Treaſon*; It was anſwered by one of the long *Robe* there, (who would not have ſpared to have aſſigned the Treaſon, had there been any) that however they ought to give the *title* of *High-Treaſon* to the Articles, *for that otherwiſe they would dwindle to nothing when they came into the Houſe of Peers.* Now in the Impeachments of the other Lords (not to meddle with the Truth or Falſity of their Accuſers) they were Charg'd with the higheſt Treaſons in Name, and upon Oaths made againſt them.

*Thirdly*, When a *ſhort* day was ſet by the Lords for his being heard,

and

and that he appeared that day accordingly, his Council was then Threatned if they did dare to plead matter of Law for him: Which he said was never heard of before in any Man's Case whatever, nor in the worst of times.

*Fourthly*, He said if all the Articles had been true against him, and had been Treason; he had his Majesty's *Pardon* (which he then shewed to the Court, and demanded the benefit of it) saying, that that did pardon both his Crimes (if he were Guilty of any) and his Imprisonment, and yet, that both that *Pardon* and *he*, had been *Prisoners* together for above three years (of which he said he durst confidently affirm, that his was the first Precedent since the Conquest.

*Fifthly*, He set forth that he had not only his Majesty's *Pardon*, but that there had been his Majesty's *Declaration* of it in his *Speech* to his two Houses of *Parliament*, together with a *Declaration* of his Innocency, and a *Declaration* that he would give him his Pardon *ten* times over, if that were defective either in *matter* or *form*. And in this also he said that his Case was not only particular from any others, but that such *Declarations* of the King's Intentions to Pardon (although the *formal* Pardons have not been obtained) have heretofore been alone a ground to procure Bail at least, when the Party has been the King's *Prisoner* and at the King's Suit, which he supposed was not doubted in his Case.

*Sixthly*, He said that he had not only been thus Committed, and thus detained for above 40 Months, but he had been kept a Prisoner without any prosecution for the greatest part of that time; which is *another* sufficient ground by the Law for Bail: But instead of a restraint *Ad Custodiam*, he said he had undergone punishments greater than the Crimes alledged against him could have deserved, if they had been true; both by the length of his Imprisonment (which was agreed to be a sufficient *Ground* for Bail, both by the King's Council and the Prisoner's, in the Arguments on the Grand *Habeas Corpus* 3° *Car.* as also in *Melvin's* Case, 1° *Car.* and in Sir *Tho. Darnell's* and other Cases.

By the Inconvenience of his Accommodations in the Prison, for above two years and a half of the time.

By two most dangerous Sicknesses in the Prison. And

By the loss of divers of his Family since his being in Prison, who would some of them most certainly not have been in those places where they have been lost, had he been at liberty.

He said he was informed, that his Majesty had been again pleased to give his Directions to Mr. *Attorney*, to give his Consent a second time to his *Bail*, and he did beg leave to ask Mr. *Attorney* if it were so? Whereupon Mr. *Attorney* did stand up, and say, that he had his Majesty's Directions to give his Majesty's Consent again to his Lordship's being Bailed.

His Lordſhip did thereupon ſay, that this alſo was particular in his Caſe; and he did believe, there was ſcarce a Precedent in the World, of the *King*'s Priſoner, and at the King's Suit, not being Bailed when there hath been the *King*'s Conſent to it; unleſs where the Priſoner hath not been able to find ſufficient Security for his Appearance to abide his Trial. For that the two only Juſtifiable Grounds for the Continuance of Reſtraint by the Law are, either for keeping the Party from being able to doe any harm by his being at Liberty, (of which the King is the beſt Judge) or for ſecuring the Party to abide the Judgement of the Law, (in which the Court ought to have good ſatisfaction) and ſo they might have ſufficiently in his Caſe.

He ſaid, that the Precedent would be no leſs ſtrange and new againſt the King, than againſt himſelf, if they ſhould not permit him to be Bailed under ſuch Circumſtances: For he had heard, that the Law did admit of no *Abſurdity*; Now he did deſire to know, how any thing could in reaſon be more *abſurd* on behalf of the *King*, than if the *King*'s Priſoner and at the *King*'s Suit, ſhould be kept in Priſon by any of the *King*'s Courts, againſt the *King*'s Will?

Or how ſaid he can any thing be more dangerous to the Subject, or be a plainer *failure* of Juſtice (whatever may be pretended to the contrary) than to ſay, that there can be any ſuch reſtraint of *Engliſh* liberty, as cannot obtain ſo much as Bail, but by the leave of the Houſe of Lords? When that Houſe can neither meet but when the King pleaſes, nor can never ſit longer than he pleaſes: So that to ſay a Man ſhall be a cloſe Priſoner (I mean by that a Priſoner without Bail, for Bail it ſelf is Impriſonment in the Eye of the Law) till he ſhall be diſcharged by the Houſe of Lords; is to ſay, that a man ſhall be a Priſoner during the *King*'s pleaſure; which was the Great Grievance complained of, when the *Petition of Right* was granted, and that was thought to have fully and for ever Redreſſed that Grievance.

But if after ſo many heats and diſputes which our Anceſtors have had with the Crown about their Liberties, this Doctrine ſhould now be admitted for Law; We would ſeem to endeavour, (as much as in us lies) to bring it to this Concluſion, and be our own *Felo's De ſe*; *That the King ſhall have a way found out by our ſelves, and without his ſeeking how he may Impriſon any Man, or number of Men when he pleaſes in a Parliamentary way; and by Diſſolving that Parliament, he may keep them as long as he pleaſes in a Priſon without remedy: But that he ſhall neither have power to Relieve us himſelf by his own Authority, nor by his Courts of Juſtice.* So as in ſhort by this Doctrine; The King ſhould only have power to *hurt* his Subjects as much and as long as he pleaſes, but ſhould not be able to doe them any *Right* if he would; and then we ſhall have *Magna Charta* and the *Petition of Right* Reverſ'd, inſtead of receiving that benefit by them, which the Kings of *England* have been ſo Gracious as to give us, and all the Learned Writers upon thoſe happy *Laws* of *Liberty* have told us we are ſecure under, *at all times, and againſt all Accidents whatever.*

He

He then begg'd leave to obſerve to his Lordſhip what he found in my Lord Chief Juſtice *Coke*'s Comments upon *Magna Charta*, who ſaid, that the words *Nulli Vendemus, Nulli Negabimus, aut Differemus Juſtitiam vel Rectum*, are ſpoken in the Perſon of the King, who (in Judgment of Law) is always preſent, and repeating the ſaid words in all his Courts of Juſtice.

And therefore (ſays he) every Subject in the Realm may *at all times* have remedy by the courſe of the Law, and may have Juſtice done Freely, fully, and Speedily, without delay, for that Delay is a Sort of Denial.

The ſaid Lord *Coke* obſerves further, that thoſe words of *Magna Charta* are fully Expounded by latter Statutes (*viz.*) 20 *E.* 3. &c. which do direct, that there ſhall be no *delay* nor *hindrance* of ſpeedy Juſtice to any man, neither by any *Seal*, nor by any *Order*, nor any *Writ* whatſoever; neither from the *King*, nor from any *other*, *nor by any other Cauſe*.

Now whatever may be ſaid out of other Conſiderations, he ſaid no Man can deny, but that there is great *delay* of *Juſtice* (to ſay no worſe of it) to any Man who (through no neglect of his own) can neither get *Trial* nor *Bail* in above three years, although his Crimes were never ſo great: And he ſaid he durſt be confident, that the Makers of *Magna Charta* did believe they had ſecured all *Engliſh Men* from ever being under the poſſibility of ſuch a Danger; and that he made no queſtion at all, but that by *Law* we are ſo.

He ſaid, that the ſaid Lord *Coke* does ſay in his Comment upon the 15th. *W.* 1°. (where he ſpeakes of what things are Baileable, and what are not, and names Treaſon amongſt the things not Baileable) that is (ſays he) ſuch offences ſhall not be Replevied by the Sheriff, but all or any of theſe he ſaith may be Bailed in the *King*'s-*Bench*.

And he ſaid he had alſo ſome of the *preſent* Judges opinions to ſhew, in this point, which he deſired to Reade out of a *Copy* of the Lords *Journal*, (*viz.*) 23d. *Decem.* 1678, *the Queſtion being put, whether the Lord Treaſurer ſhould withdraw, 'twas carried in the Negative*; and on the 27th. of the ſaid *December*, *the Queſtion being put, whether the Earl of* Danby *Lord High Treaſurer (who ſtands Impeached by the Houſe of Commons) ſhould be Committed? It was Reſolved in the Negative.*

And it was the ſame day propoſed to the Judges, whether the Judges can Bail any Perſon in Caſe of *Miſpriſſion* of Treaſon, wherein the King's *life* is concern'd?

To which Sir *William Scroggs* (Lord Chief Juſtice of the *King*'s-*Bench*) Sir *Francis North* (Lord Chief Juſtice of the Court of *Common-Pleas*) Juſtice *Windham*, Juſtice *Jones*, and other of the Judges then preſent, gave

gave ſeverally their Opinions; that the Court of *King's-Bench* may take Bail for High-Treaſon of any kind, if they ſee cauſe.

He cited the Lord *Coke* alſo in his Comment on the 24th. *W.* 2°. where he ſays, that it is a Rule in Law, *Quod Curia Regis non debet Deficere Conquerentibus in Juſtitia Exhibenda.* And the reaſon of this is, that a *failure* of *Juſtice* may be prevented, which he frequently ſays, is *Abhorred by the Law:* So as it appears, that *The Law Abhors all failure of Juſtice,* and he ſaid, that if ſuch *failure* do appear in his Caſe, or any Man's elſe, no *Order* can licenſe ſuch Failure nor *no Court* can Juſtify the not giving Relief againſt it; and he ſaid, he ſhould either make ſuch failure appear, or his Lordſhip (meaning the Lord Chief Juſtice) would be able to tell him where he might repair for Juſtice; which both *Magna Charta* and the *Petition of Right* are underſtood to have provided *at all times for the Subjects Liberty:* But if his Lordſhip could not inform him where he might appeal forthwith for his Liberty, in that Caſe he ſaid, that for that reaſon alone (were there no other) he ought of *right* to be admitted to Bail by that Court, till he could be brought before ſuch a *Judicature,* as had power to diſcharge him.

He obſerved alſo, that the Lord *Coke* (in a Chapter on the *King's-Bench*) did ſay, that that Court might Bail for any Offence whatſoever, and that in the ſaid Chapter it was particularly obſerved, that there had been ſuch care taken by the Law to avoid *failure of Juſtice* (even in ſmall matters, in compariſon of Liberty) that he gives there an Example concerning a *Clerk* or *Officer* of that Court: For he takes notice of what things, and againſt whom, that Court hath power to hold *Plea* by *Bill*; And amongſt thoſe, he names againſt any Officer or Clerk of that Court, and gives the reaſon; becauſe if they ſhould be Sued in any other Court, they would have the Privilege of that Court, which might be the cauſe of a *failure of Juſtice*; and from this his Lordſhip ſaid it did appear, that the Law intended, that there ſhould be no *failure of Juſtice* by the privilege of any Court, how great ſoever it was; for that (as was ſaid before) the Law did abhor all *failure of Juſtice:* And he ſaid, if ſuch care had been taken againſt a failure, in ſuch ſmall matters, and not in what concern our *Liberties,* all *Engliſh* men ought Juſtly to break out into the like Exclamations, as the ſame Lord *Coke* and many others did, in their Speeches in Parliament, and in their Pleadings, 3° & 5° *Car.* upon the Arguments of the Grand *Habeas Corpus* at that time where the Lord *Coke* breaks forth into this Expreſſion; *Shall I have an Eſtate of Inheritance for life or for years in my Land? And ſhall I be Tenant at Will for my liberty? Shall I have property in my Goods by the Laws? And not liberty in my Perſon?* And thereupon he tells us, That *Perſpicuè vera non ſunt probanda:* As taking from granted, that our *liberties* were not to be doubted where our *properties* were ſo ſecured: And the King (ſays he) had diſtributed his *Judicial* power to Courts, and to his Miniſters of Juſtice; *Who are to ſee right done.*

And

And he ſaid the Lord *Cook* gave the Reaſons of thoſe Laws which are againſt undue Impriſonments, and that one of thoſe is, *for the indefiniteneſs of time*, which he ſays may be *perpetual during Life*, and that his words are, *That it is unreaſonable to think, that a Man has a Remedy for his Horſe or Cattle, (if detained) and* none *for his Body Indefinitely Impriſoned: For that a Priſon without any prefixed time is a kind of Hell.*

And here his Lordſhip ſaid, that he hoped the Court would either allow him Bail, or tell him a *prefixed* time, when he ſhould be Tryed or Diſcharged: he did then alſo Quote the Caſe of the *Duke of Suffolk*, 28 *H.* 6, and the opinions of *Preſcot* and *Forteſcue*, (who were eminent Judges) who ſaid, that he ought not to be Committed, (though for Treaſon) without Eſpecial Cauſe of the Treaſon ſhewed, which had not been in his Caſe.

He further ſaid, That many other Principal Gentlemen of that Parliament had ſpoke moſt *ſenſibly* on the ſame Subject of Liberty, and amongſt the reſt, Sir *Robert Philips* had ſaid, To have our Liberties (which are the Souls of our Lives) taken from us, and to be pent up in Goals without Remedy by Law, and this to be ſo adjudged, (for ſo that Court had then thought fit to deny Bail, for Reaſons which were at that time alſo beſt known to themſelves) he cries out, *Oh improvident Anceſtors! Oh unwiſe Fore-Fathers! to be ſo curious in providing for the quiet poſſeſſion of our Lands, and to neglect our Perſons and Bodies! And to let them lie in Priſons! And without Remedy*, durante bene placito! *If this be Law, what do we talk of our Liberties? This* (ſays he) *is* Summa Totalis *of all Miſeries.*

He ſaid alſo, That Mr. *Selden* did in the ſame Parliament argue at a Conference with the Lords, That in all Caſes where any *Right* or *Liberty* belongs to the Subject, by any *Poſitive* Law, written or unwritten; if there were not alſo a Remedy by Law, for enjoying or regaining of this *Right of Liberty*, when it is violated, or taken from him; the *Poſitive* Law were moſt vain, and to no purpoſe; and it were to no purpoſe for any Man to have any Right in Land, Liberty, or other Inheritance, if there were not *a known Remedy*, by which in ſome Court of *ORDINARY JUSTICE* he might recover it; and in this Caſe of Right of Liberty of Perſon, if there were not a Remedy in the Law for regaining it, when it is reſtrain'd; it were to no purpoſe to ſpeak of Laws.

Here de deſired leave to ſhew his Lordſhip what Sir *Nicholas Hide* (when ſitting as Lord Chief Juſtice in that Court) did ſay on this occaſion, *viz.* That the Kings pleaſure is, his Law ſhould take place and be Executed; and for that do we ſit here; and whether the Commitment be by the King, *or others*, This Court is the place where *the King doth ſit in Perſon to do Right if Injury be done*, and if it appear that any Man hath Wrong done to him by his Impriſonment; We have *Power to Deliver or Diſcharge him*: And he further ſaid, That the ſame Lord

Juſtice, *Doderidg*, *Jones*, and *Whitlock*, (Anſwering the Priſoners Counſel at that time) did ſay, the Attorney General had told them, That the King had done it, and that they (the Judges) do ever truſt him in great Matters; and here he took occaſion to ſay, That he hoped that the Kings Conſent to his Bail, and his Declaration of his Innocency, would be now as much truſted in this Court.

He Cited alſo the Arguments of Mr. *Calthorpe* for Sir *John Corbet* on the ſame occaſion, who ſayed, That admit the Commitment were lawful, yet when a Man hath continued in Priſon a reaſonable time, he ought to be brought to Anſwer, and not to be continued ſtill in Priſon; for that it appears by the Books of our Laws, that Liberty is a thing ſo favour'd by the Law, that the Law will not ſuffer the continuance of any Man in Priſon, longer then of neceſſity it muſt.

He Cited alſo Mr. *Hackwell*, who ſaid upon the ſame occaſion, That the Law admits not the Power of Deteyning in Priſon at pleaſure, when the Impriſonment is *but Pro Cuſtodia*, for a Man by long Impriſonment might otherways *be Puniſhed before his Offence*; and he mention'd an Expreſſion of his, That long Impriſonment was *vita pejor morte*.

He mention'd, how the Commons at the end of the Parliament, 3 *Car.* did deſire, That the Judges might declare themſelves upon the matter, why thoſe Gentlemen had not been Bailed, when (*by the Jtdges Arguments*) it was poſſible they might have been *kept Priſoners all their Days*.

To which he ſaid *Whitlock* Anſwered. Firſt, Not ſo, but they did Remand them, that they might better adviſe of the matter, and that the Gentlemen if they had pleaſed might have had a new Writ of *Habeas Corpus* when they thought fit. And Secondly, That he had ſpent much time in this Court, and that in ſuch great Caſes he never knew any Man *Bailed without the King firſt conſulted in it*, and the ſame he ſaid, was then ſaid by the reſt of the Judges of that Court.

Hereupon he made two Remarques, Firſt, That by this it did appear, that upon Conſideration, That Court had alter'd their opinions in the Caſe of Bail, juſt contrary to what their firſt opinions had been poſitive in; and Secondly, That the conſulting of the King was ever neceſſary in ſuch Great Caſes; and he ſaid, he did believe, that there was not a Preſedent, where the King had agreed to the Bail, that ever it had been denied.

He ſaid, That thoſe Men whom he had Quoted were Men of no ordinary Underſtanding in the Laws, and as the Judges then did at laſt acknowledg their ſenſe of them to be right, ſo he ſaid, He hoped our Laws were neither changed nor diminiſh'd, in what related to the *SUBJECTS LIBERTIES*; and he hoped that no Order of one Houſe, nor Ordinance of both Houſes, nor King alone, nor King and either Houſe alone, could alter them; and he reſted aſſured, that a King and Parliament would never alter them to the prejudice of Liberty.

He

He proceeded, That if the Law were ſtill the ſame it was heretofore, it was plain that that Law did both give a power to that Court to Bail for all Offences whatſoever, (and for Treaſon perticularly) and did require, that *the Subject ſhould at all times find remedy in it*, when his Liberty was Reſtrained, *BY ANY CAUSE WHATEVER.*

The chief Reaſons he ſaid, why ſuch large Powers had been given to that Court, were principally *for avoiding all failure of Juſtice*, and to the end, Firſt, That the King may both have a means of giving Right to his Subjects *at all times*, according to his Oath at his Coronation, and according to the intent of *Magna Charta*, and the *Petition of Right*: And Secondly, That there might be *a conſtant place* for the Subject to reſort unto for *Remedy at all times*, whenſoever he was oppreſs'd in his Liberty: And he hoped we were not now to learn a new Law, that the King could neither keep his Oath, nor maintain *Magna Charta*, nor the *Petition of Right*, without the Aſſiſtance of an *Extraordinary Court*, which he may both chuſe, whether he will call, or when he will call it, and how long it ſhall ſit; which (as he had ſaid) would put all under the *King's abſolute Will.*

He then ſaid, He took for Granted, that there would be no diſpute made in this matter, but that there was *an Order of the Lords* which was ſuppoſed to ſtand in the way: But he ſaid, If his Lordſhip would give him leave, he would firſt ſay ſomething to the Order it ſelf, and then he hoped to ſhow his Lordſhip, that it ſtood not at all in the way as to his Requeſt of Bail; and that it ſhould neither be interfered with in the leaſt, nor the Juriſdiction of the Lords, nor their Proceedings medled with in any kind by his being Bailed; but rather owned, and ſubmitted to, by his being Bailed to the Parliament.

And firſt for the Order it ſelf, He deſired the Court to obſerve, that it was Dated the 19*th* of *March*, 1678. and worded as followeth, (*viz.*)

*Die Mercurii*, 19^no^ *Martii*, 167⅞.

"THE Houſe this Day taking into Conſideration
" the Report made from the Lords Committee for
" Priviledges, that in Purſuance of the Order of the 17*th*
" Inſtant to them directed, for conſidering whether Peti-
" tions of Appeal which were preſented to this Houſe *in*
" *the laſt Parliament*, be ſtill in force to be proceeded on;
" and for conſidering of the State of Impeachments
" brought up from the Houſe of Commons *the laſt Par-*
" *liament*; and all the Incidents relating thereunto; up-
" on which the Lords Committees were of opinion, That
" in all *Caſes of Appeals*, and *Writs of Error*, they conti-

nue,

" nue, and are to be proceeded on in *Statu quo*, as they " ſtood at the Diſſolution of *the laſt Parliament*, *without* " *beginning* De novo. And that the Diſſolution of *the laſt* " *Parliament* doth not alter *the State of the Impeachments* " brought up by the Commons in *that Parliament.*

Now upon this Order he obſerved, That it related as well to Appeals and Writs of Error, as to Impeachments; and ſeemed to be more fully worded to them, than to Impeachments: The Words STATU QUO, and *without beginning* DE NOVO being annexed in the Order more particularly to the Appeals and Writs of Error; whereas all that was ſaid as to the Impeachments, he obſerved to be, that the Diſſolution of THAT LAST PARLIAMENT doth not alter *the State of Impeachments* brought up by the Commons in THAT PARLIAMENT, and are not words which (ſtrictly taken) can bind after the Diſſolution of any other *then that Parliament.*

But he ſaid, if the Order ſhould be Expounded otherways, yet that both the Law, and the Practice of the Inferiour Courts, were undoubtedly contrary, *In the Caſes of Appeals and Writs of Error.* And he hoped no Court would take upon them to Expound the Order ſo, as if they were at liberty, to ſplit the Order, and to Judg *which part of the ſame Order ſhould be binding and which not*, for that that would be to meddle in a more Extraordinary manner with the proceedings of the Lords, than he had deſired.

Now as to *Writs of Error*, he ſaid, there were full Reſolutions of the Judges in the Caſe, tho in times of Prorogations only, when a day is ſet for the Sitting of the Lords Houſe, and he cited the Caſe of *Heydon* and *Godſalve*, in *Crooks* Reports; as alſo the Lord Ch. Juſt. *Hales*, who did not only grant Execution upon a Writ of Error (depending in Parliament) but did alſo Anſwer the Defendants Council (who would have pleaded the Lords Order in bar of the Execution) that he ſhould always pay all due Reſpect to that Superiour Court of the Lords, but that he muſt act according to Law, and that he knew, that the Lords did not intend otherwiſe. And of this Lord Ch. Juſt. *Pemberton* himſelf, who he ſaid had denyed Reſtitution upon an Execution lately taken out, in a Caſe where a Writ of Error was and is ſtill Depending in Parliament. And in *Caſes of Appeals*, he ſaid he was Inform'd, that the Court of Chancery did not take any notice of the Appeal being in Parliament after a Diſſolution, but did notwithſtanding proceed to Sequeſtration. And he ſaid that there was a late Precedent in the Court of Exchequer, in the Caſe of one *Fountaine*, where an Appeal was brought from a Decree in the Exchequer, and Recognizance entred into by the ſaid *Fountaine*, to abide the Order of the Houſe of Lords, and after the Parliament was Diſſolved, the Council of the ſaid *Fountaine* did Inſiſt on the ſaid Order before the Barons, that the Houſe being poſſeſt of Mr. *Fountaines* Cauſe, and Security having been given by him to abide the Order of the Houſe, that no Proceedings ought to be had in the Exchequer

chequer upon the ſaid Decree, until the matter on the Appeal was determined before the Lords. Notwithſtanding which, and that Mr. *Fountaine* produced the Lords Order in Court, and produced the ſecurity allow'd, yet the now Barrons Declared and Ordered, that the Decree by them made ſhould be proceeded on againſt the ſaid *Fountaine* in the Court of *Exchequer*: And a proceeding hath been had accordingly.

By all which he Obſerved, That the Inferior Courts did proceed upon *matters forbid as much by the Houſe of Lords*, in the matters of Appeals and Writs of Error, as it was upon Impeachments, and yet that the reaſon was plain why they did ſo, for that the Parliament might proceed again upon the ſame Appeals, and Writs of Errors, notwithſtanding thoſe proceedings in the Inferior Courts, in the interval of Parliaments; for that none of thoſe Acts of the Inferior Courts, does ſo hinder the proceedings of the Superior, but that the Plaintiff in Parliament may revive the ſame matter there again, by *Scire Facias*, or by Re-ſummons, &c. But he ſaid, It was never heard of, that the Lords themſelves did proceed again *Ex Officio*, without the Petition of the Party to revive the Cauſe: And ſo he ſaid in the Caſe of Impeachments, that the Lords would no more proceed *Ex Officio* upon that neither, unleſs they were called upon by the Proſecutors, and then *their Lordſhips proceedings upon the Impeachment would be no more hindered by the Bailing of him in the Inferior Court, then they were in the other Caſes by the Executions and Sequeſtrations which are Granted in the intervals of Parliament*, which were for the the prevention both of *DELAY and of FAILURE of JUSTICE.*

Beſides he ſaid, If this ſhould not be done, how could it be known, whether the Proſecutors of an Impeachment from the Houſe of Commons (who are never the ſame Men in a new Parliament,) will proceed any more upon a former Impeachment? For he ſaid it had many times fallen out otherwiſe, and he Cited a late Caſe of the Lord *Mordant*, who was Impeach'd upon Articles in one Seſſion, and having taken out a Pardon during the Prorogation, was never more called upon, nor never queſtion'd upon the former Impeachment; although the very ſame Parliament ſat again, which had Impeach'd him, and therefore he ſaid, That the Caſe might more probably happen to fall out ſo, when a new Parliament ſhould meet again, which would conſiſt of new Men.

He ſaid, It was likewiſe to be Obſerved, that although the Tranſcript of the *Record* in a *Writ of Error* might have Days of continuance, yet no *Superſedeas* is grantable; and he ſaid, That if the Lords Order be no ground for a *Superſedeas* on a Writ of Error, why the lying of an Impeachment ſhould be a ground for Confining a Man within Fower Walls all his Life, he was ſure muſt be both leſs reaſonable and leſs juſt, As Liberty was more valluable then Property, and without which, Property could be of no comfort.

In the next place he Obſerved, That if the Order ſhould be continued litterally to mean, that the Impeachments as well as the Appeals and Writs of Error (and the Incidents relating to all of them) ſhould remain in the ſame State they were at the Diſſolution of *THAT PARLIAMENT* mentioned in the ſaid Order, his caſe thereupon he ſaid would be quite different from any others, for that he was *not under any Commitment* at the *Diſſolution of THAT PARLIAMENT*, nor at the time when *THAT ORDER was made*, but was *then at liberty* to be a ſitting Member of that Houſe, and *by a Vote of the Houſe, had leave to continue ſo*, for that (as he had already Obſerved) the Date of the Order was the 19*th* of *March*, 1678. and the Warrant of his Commitment did appear by the return before the Court to be, the 16*th* of *April* following: Inſomuch that he deſired the Court to take notice, that the ſtrict Letter of the words *Statu Quo* in the Order (compared with the time when the ſaid Order was made) would be an Argument to ſet him *in a State of Liberty as he then was.*

He then told the Court, That by what he had ſaid, he hoped he had made appear, that the Order did not afford the leaſt ſhadow for the hindering of his being Bailed; but that on the contrary, the Reaſons were much ſtronger for the doing of that, (as it related not only to him, but *to the Liberty of the Subject in General*) then for the proceedings which the Inferior Courts do daily practice upon Appeals and Writs of Error, (*which are but for Property*) and are *compriſed in the ſame Order*, and therefore he ſaid, That he hoped he ſhould at leaſt find the ſame favor in a Caſe of Liberty, which is allow'd every day in Caſes of leſſer Moment.

He then ſaid, (that although it did not concern his particular Caſe) Yet for the ſake of *Engliſh Liberty it ſelf*, he could not but ſay ſomething further upon this point; for he could not but be of opinion, That if the Order had directly forbid Bail, which it was far from doing) and beſides, the Lords own practice had ſhew'd their meaning to the contrary, by the Bailing of a Commonnor, whoſe Crimes were declared to be greater then his, and in which Caſe they made no *Non Obſtante* to their Order, but take that to be ſtill in the ſame force towards him, as towards any others who are in Cuſtody) yet he ſaid, In that Caſe, if ſuch an Order ſhould be found to be againſt *Magna Charta*, and the Fundamental Right of the Liberty of the Subject, (as any thing muſt be *which does Subject any Man to an INDEFINITE IMPRISONMENT:*) he conceaved that of Right, that Court ought to free any Man from ſuch a Slavery, (for he ſaid, he could give it no better a name) and he then Cited an Argument of the Earl of *Shaftsburyes* upon that point, which that Lord argued in that Court upon an *Habeas Corpus*, when the Court agree'd they would have Bailed him, had it not been in a time of an *Adjournment* only of the Parliament; his words he ſaid, were, *That this Court will and ought to Judg AN ACT OF PARLIAMENT VOIDE, if it be againſt MAGNA CHARTA, and more might it Judg of AN ORDER OF THE HOUSE OF LORDS, that is put in*

*Execution*

*Execution to deprive any Subject of his* LIBERTY; and as he ſaid, this could not be denyed to be Law, ſo he was confident the Earl of *Shaftsbury* was ſtill of the ſame mind, and ſo muſt every Lord in *England* be, or (when they conſider their own Caſes) they would make their Liberties to be very precarious.

He proceeded to ſay, That the Earl of *Shaftsbury* being allow'd to be a knowing Man, both in the Laws, Orders and Conſtitutions of Parliaments; he would beg leave to Quote another part of the ſame Speech, (viz.) *That* Mr. *Attorney*, (which was then Sir *William Jones*) *was pleaſed to Anſwer the Inſtance of one of his Lordſhips Council, That if a great Miniſter ſhould be Committed, he hath the Cure of a Pardon, a Prorogation, or a Diſſolution, but* (ſays the Earl) *If the Caſe ſhould be put, why Forty Members, or a greater number, may not as well be taken without any Remedy of any of the King's Courts; his Lordſhip ſaid, That* Mr. *Attorney could not very eaſily Anſwer; and if in this Caſe* (ſays he) *there can be no relief, no Man can foreſee what may be hereafter*: And in another place of the ſame ſpeech, he ſays, *He does not think it a kindneſs to the Lords to make them Abſolute, and above the Law, for ſo it muſt be, if it be Adjudged, that they may Commit a Man to an* INDEFINITE IMPRISONMENT.

He ſaid, He took theſe Men whom he had named, for no ſmall Authorities in this Age, and the Earl of *Shaftsbury*, he ſaid, was a Man ſtill as much for the maintaining of this Order as ever, but that his Lordſhip did ſhew himſelf at the ſame time to be for *Engliſh Liberty*, and he plainly ſhew'd his own Sence, both of this, and of all Orders whatever, which concern'd the Liberty of the Subject, and declared, that he took that Court to be the proper Judg of all ſuch Orders.

He ſaid, It thereby appeared, how ſenſible that Lord was, that ſuch Caſes might concern Forty as well as One, and Members of either Houſe, as well as other Men, and without relief, if it ſhould be admitted, that *ORDINARY COURTS could not relieve*; and the Earl of *Danby* ſaid, That there was no Anſwering of theſe Arguments of the Earl of *Shaftsbury*, unleſs it could be denyed, *That the King can Impeach as well as the Commons, or that the King cannot Call and Diſſolve Parliaments at his own Will and Pleaſure*: For if he may (as was not to be doubted) he ſaid, He was ſure *every Man in* England *was in the ſame Danger, when the King pleaſed*, and then he ſaw nothing whereby we had any Security, but that we lived under a King who would not Exerciſe this Power over us, which we will needs put into his hands, although he does not deſire it himſelf: As if we were ſo weary of our Liberties, that we would be Induſtrious in contriving how we might inſenſibly ſlide into thoſe Slaveries, which our Anceſtors have been ſome Ages taking pains to ſecure us from, and our Kings have been ſo gracious as to Grant and Confirm to us, ſo many times over as they have done; and which other Kings may be as ready to reaſſume hereafter, as we are to give them away.

He

He concluded his obſervations upon that Speech of the Earl of *Shaftſbury*, with taking notice, that his Lordſhip had ſhew'd he was one of thoſe Peers who would take it for no kindneſs to be made abſolute, and above the Law, by ſuch Orders of theirs being conſtrued to extend to *INDEFINITE IMPRISONMENTS*.

He then repeated Sir *William Jones* his Declaration in that Court, *that either a Pardon, a Prorogation, or a Diſſolution was a Cure againſt ſuch Impriſonments*, and he obſerved thereupon, that if that Doctrine were true, *that any one of thoſe was a Cure againſt ſuch Impriſonment*; (and he could not doubt of it's being good Law) then certainly he ought to find relief from his Impriſonment, *who had every one of thoſe Cures on his ſide.*

He then deſired to put the Court in mind, how in the worſt of times, Juſtice had taken place ſo far, as *to lay aſide the force of Orders made in Parliaments after the Diſſolutions of thoſe Parliaments which made them*, although it was to the prejudice of the Intereſt of thoſe Uſurpers themſelves.

He cited an Inſtance of one Sir *John Stowel*, who by the Articles of *Exciter* was to have been admitted to compoſition for his Eſtate, but yet contrary to thoſe Articles, the Parliament did afterwards order his Eſtate to be ſold. After the Diſſolution of which Parliament, Sir *John Stowel* pleaded by his Council (*which were Serjant* Maynard *and Mr.* Latch) that *that Order was Diſſolved by the Diſſolution of that Parliament*; and that therefore the Articles were again in Force; and that the Plea was admitted to be good, and Sir *John* reſtored to the benefit of the Articles upon that Plea, *even by* Bradſhaw *himſelf.* But he ſaid, he was ſorry that he could neither have Sir *William Jones* to argue thoſe points for him which he had uſed againſt my Lord *Shaftsbury*, nor Serjeant *Maynard* to make good *the Invalidity of Parliamentary Orders after Diſſolutions*, but he ſaid, that it was not his fault, and he doubted not but he was before more Juſt Judges than there was in thoſe ill times, and that he hoped *that the Liberty of the Subject was not now more Precarious than it was in thoſe days.*

He added, that if upon *ſuch Orders* Men could not be Bayled in the Interval of Parliaments, they would become *Grievances* equal to the *Multiplications of Treaſons* in former Days, which have ſome times been greedily made heretofore by Parliaments in Diſtemper'd Times, but the Commons had never been quiet till they could get their Bear chain'd up and their Laws reduced to the old ſtandard of Treaſon again; But yet thoſe things had been done by Acts, and not by Orders of Parliament.

He deſired them likewiſe to remember, that it had been one of the chief grounds of the late War betwixt the King and his Parliament (in which ſo much blood had been ſhed) that an Ordinance of Parliament ſhould not be held equal to an Act of Parliament, and yet thoſe were Orders

ders of both Houſes: And now ſaid he, ſhall we be defending, that an Order of one Houſe only, ſhall be Equivalent to a Law? and ſhall be in force againſt our greateſt and moſt ſacred Laws of Liberty, which have been ſo confirmed to us? This, ſaid he, I am not able to underſtand the reaſon of, nor will any Man, who ſhall give himſelf the leaſt leiſure to think upon it.

He then ſaid, He deſired to ask any Man that then heard him, or any Commonor of *England*, who would but take time to conſider this Caſe, ( *which may be any Mans in* England, ) whether they would be contented to inveſt the Lords with ſuch an *Inherent* Power over their Liberties, which they can no more be exempted from then the Peers themſelves?

And he ſaid, That the Lords had already made it appear, that they would not have any ſuch *Arbitrary Power* placed in them, for that they had refuſed to paſs a *Favorite Act*, (which was for their own Tryals) only by reaſon of a Clauſe which was Incerted therein, *To have Enacted the Subſtance of this preſent Order into a Law.*

And he ſaid, That the Houſe of Commons deſiring that ſuch a Power might have been Enacted into a Law, ( *though themſelves would have been the firſt who would have repented ſuch a Law*, ) did ſufficiently denote, *That the Commons did not think the Order would be binding in Law after their Diſſolution*; for otherwiſe what need was there *of a Law*? if the Order was in force after Diſſolution, *without a Law.*

Upon the whole he ſaid, He thought the Diſtemper of that time had given more weight to the Order, then any thing elſe, and ſome of their Lordſhips on that Bench did know, both in what an heat it had been made, and how it had been ſince blown upon by the Lords themſelves; who he was confident would no more endure to have it Conſtrued in that Sence which now ſeems to be put upon it, ( *of Subjecting Men to be under INDEFINITE IMPRISONMENT*, ) then they will endure themſelves to be every Day put in the Stocks.

As he had ſaid thus much to the Order it ſelf, ſo he ſaid, He hoped to make appear, *That the Courts Bailing of him would not at all Intrench upon the Order, nor meddle with the Juriſdiction of the Lords, nor their Proceedings in any kind.*

For that he took it for granted, That what is done by that Court, and the Courts of *Chancery* and *Exchequer*, on Appeals and Writs of Error, was underſtood not to meddle at all with the Juriſdiction nor Proceedings of the Lords in thoſe Caſes, and *that this was juſt the ſame, all being alike Subject to the final Determination of the Lords, whenever they pleaſed to call the Appeal, Writ of Error, or Impeachment, before*

*them, and without any prejudice to their Lordſhips Proceedings by any of thoſe Acts done by that or the other Courts in the Interval of Parliaments.*

Beſides, he ſaid, It had been uſual to Bail in that Court to the Juſtice Seat in Eyre, and yet that that Court could not proceed further.

He Inſtanced alſo, That Courts allowing of the Pardons of Peers, (when pleaded there) and yet that they had no power to proceed to the Tryal of a Peer.

And ſo he ſaid, There were divers other Inſtances of that Courts proceeding to ſuch and ſuch degrees of Exerciſing their power to avoid delays, &c. where the Court had no Juriſdiction to determine the matter.

Precedents he ſaid were not to be expected, which were exactly fitted to his Caſe, becauſe he durſt be bold to ſay, there never was ſuch a Caſe before, (when well conſidered in all its Circumſtances,) nor he hoped never would be again: But he ſaid, That therefore both the Kings Power and the Peoples Liberties would be the more concern'd in what Reſolution ſhould be given by the Court in this Caſe of his.

He ſaid, There were Precedents of Diſcharging of Men Impeach'd in Parliament upon the Kings Writ to that Court, Commanding the Proceedings to ceaſe, and they have been Diſcharg'd accordingly by that Court, without any other Reaſon given in the Writ, but becauſe the King held the Parties to be Innocent and free from the Crimes Charg'd againſt them. As in the Caſes of *Melton* Arch-Biſhop of *York*, and *Graveſend* Biſhop of *London*, 7 *E.* 3.

He mentioned alſo *Hugh Spencer*, and Sir *Thomas Barkley's* being Mainprized to Parliament, and yet that the latter was upon ſuſpition for the Murder of a King, (*viz.*) *Edward* the Second.

He ſaid, Inferior Courts had Bailed to Parliament about the Popes Bull, &c. *Reg. Writs*, 274.

He ſaid, A ſingle Judg (*viz.*) Sir *Robert Atkins* had lately Bayled one for Treaſon, and another for Murder, and that he did himſelf hear his Juſtification of both allow'd (as to the Legal part) before the King and Council.

He ſaid, That Kings had formerly aboliſh't Accuſations of Treaſon, and Inſtanced a Caſe of *Talbot* againſt *Ormond*, in the time of *H.*6.

And to ſhew how powerful the bare intention of Kings to Pardon had been heretofore, he Inſtanced the Caſe of a man Indicted of Felony, who (without any Council) ſhew'd forth a Charter of Pardon to the Court,

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which was diſcordant to the Indictment, and alſo to his name, and yet becauſe the Court perceived that it was the King's Intention he ſhould be pardoned, he was Remanded to get a better Pardon. 26 *Aſſ.* p. 46.

And he did thereupon ſay, That he hoped the Kings Intention of Pardon as to him, had been ſufficiently declared to the whole Kingdom.

And in ſhort he ſaid, that if the matter was proper for the Juriſdiction of that Court, before it was in Parliament; it's having been there, did not take away the Juriſdiction from a Competent Court, when the Extraordinary Juriſdiction fails; which was not to be ſuppoſed could lay all other Juriſdictions aſleep, when itſelf was not in being; and eſpecially when that Competent Court ſhould do nothing in Contradiction to the Proeeedings of the Extraordinary Court, as he hoped he had made appear, that that Court would not do by the Bayling of him.

Whereas on the contrary, he ſaid it was moſt evident, that *Juſtice did fail in the higheſt concern* (*which is that of Mens Liberties*) unleſs he could be inform'd when and where he might certainly be either Tryed or diſcharged, for that (as he had ſaid before) it was agreed both by the Council for the King, and the Conncil for the Priſoners, in the Arguments on the Grand *Habeas Corpus*; that *INDEFINITE IMPRISONMENT* was held to be *PERPETUAL IMPRISONMENT which the Law did admit in no Caſe where the Impriſonment was only AD CUSTODIAM.* And although his had been intended but AD CUSTODIAM, yet it could not be denyed, but *it had already been* ad Gravem pænam, *and without any perticular Cauſe yet ſhew'd for which he ought not to be Bayled by Law.*

He then ſaid, that *Littleton* had declared in his Arguments 5 *Car.* That if Treaſon in General ſhould be held to be a ſufficient Returne, yet that the *Kings-Bench* might Bayle: And the ſaid *Littleton* and the Kings Attorny in their Arguments (one for the King, and the other for Mr. *Selden*) did agree, *that where the Party could not avoid the Judgment of the Law, nor that there was no Danger by his being at liberty, He ought to be Bayled after long Impriſonment*, and at that time, ſix Months was taken to be long Impriſonment.

He ſaid he had read a paſſage in the Lord *Cokes* Inſtitutes, where he ſpoke of ſuch Impriſonments as he compared to the Impriſonment of St. *Paul* by the *Centurion*, who firſt put him in Chains, and then enquired who he was and what he had done.

He ſaid he would not compare his caſe to that; but that there was ſo much of reſemblance in it, that he had been in Chains (or what was there meant by Chains (which was a Priſon) for above three years, on a pretence of Treaſon, without being told to that day what kind of Treaſon

Treaſon he had committed; which had been done in no bodies Caſe but his, and by ſo much the greater was his hardſhip.

He had alſo both been Accuſed and Committed without any Oath made againſt him.

When a Day had been appointed for his hearing, his Council had been forbid to Plead matter of Law for him.

It had been acknowledged that there was no Treaſon conteined in any of the Articles againſt him, if they were all true.

And if they had been true, and had amounted to Treaſon, he had there ſhewed the Kings Pardon, which did releaſe both the Crimes and the Impriſonment.

That beſides that Pardon, he had had his Majeſties Declaration in full Parliament, both of his Innocence, and that he would Grant him his Pardon ten times over if this were defective.

That he had now had his Majeſties Conſent to his Bayle, a ſecond time, Declared to that Court by the Attorney General, by the Kings Direction.

That in all theſe foregoing Particulars, his Caſe was ſingular, and different from all others, who are or have been made Priſoners ſince the beginning of the late Plot, or (as he believed) at any other time.

Beſides theſe things which are peculiar to his own Caſe, he ſaid that theſe was alſo what was Common to other Caſes as well as his.

The length of his Impriſonment, which had been above 40 Months.

The being Confin'd ſo long under pretence (as he conceived) of an Order of the Houſe of Lords *which neither Directs nor Implies any thing to forbid Bayl.* But in that alſo he had what was particular to himſelf (which he had already ſaid, and deſired leave to repeat, becauſe it would deſerve their Conſideration) *viz. That he was at liberty, and had leave to be a ſitting Member in the Houſe of Lords at the time when that Order did declare that the Impeachments, Appeals,* &c. *and the Incidents belonging to them ſhould ſtand in* STATU QUO, *ſo that (as it already obſerved) the* STATUS QUO *(as to him) he again ſaid was to put him into a State of Liberty.*

Laſtly he ſaid, that he had no proſpect now when any Parliament would ſit, and by the examples of paſt Parliaments he might reaſonably fear, whether when they did meet, they might ſit ſo long as to give him Releif; for that his Petition had been Read the firſt Day that the laſt Parliament entered upon any publick buſineſs, or whether greater buſineſs of the Kingdome might not (as it had done already)

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ſo take up their time, as not to give them leiſure to conſider the Caſe of a ſingle Perſon: And ſince this had already fallen out to be his misfortune in Three Parliaments ſucceſſively, he took it to be but too plain *a Demonſtration of his lying under an Indefinite Impriſonment*, unleſs he ſhould find relief in that Court, *for that there was no other to Appeal unto.*

He ſaid, That in thoſe Great and Eminent Caſes which fell out 3 & 5 *Car.* about the Bayling of Perſons Committed to *Indefinite Impriſonment*, the Judges were then very poſitive againſt their Bayl, and yet changed thoſe Opinions afterwards; and ſo he hoped that Court might do upon a due conſideration of his Caſe and Circumſtances; or elſe he hoped that his Lordſhip would convince him, *that his Impriſonment was not Indefinite*, by letting him know *at what prefixed time*, and where he might reſort for remedy, which the Law does without queſtion allow to all men, and at all times.

He ſaid he was a very reaſonable man, and when he was convinced by reaſon (upon which he was ſure all Laws were founded) he could be content to ſuffer ſtill, though his Impriſonment had been ſo long already; for that however he may have been Miſrepreſented for *an Arbitrary Man*, he would rather periſh in his Priſon than have any thing done for him which the Law would not warrant: But on the other ſide, he ſhould be ſorry that his Caſe ſhould be made *a Precedent againſt Law, and againſt Engliſh Liberty*, which he was ſure it would be, if he ſhould be continued to ly *under an Indefinite Impriſonment without being bailed*; and he ſaid he was not aſhamed to ſay, in the behalf of all *Engliſh mens* Liberties, as well as of his own Caſe; That it was a Caſe which did concern every man to take care of in the Conſequences of it, and which did cry loudly for Relief.

He then told the Court, That he had troubled them long, but that he hoped it would be excuſed in a Caſe of that moment: And in the firſt place he ſaid, he hoped it was plain, that That Court had it in their power to grant him Relief if they pleaſed.

That it was as plain, that there was nothing in the Lords Order againſt it, and that the practice of the Lords had been otherways, even in the behalf of Commoners.

That it was apparent, that both that Court, and the Courts of *Chancery* and *Exchequer*, *do relieve upon Appeals and Writs of Error, which are in the ſame Order with the Impeachments*, and yet do in no ſort meddle with the Judicature or Proceedings of the Houſe of Lords.

That it was manifeſt, that let the Order be conſtrued as any man pleaſes, yet that Bailing could be no ſort of Judging of any Proceedings in the Superiour Court, *but would leave the Judgment intirely to the Parliament, and would continue him a Priſoner in Law*,

bound to appear before that Extraordinary Court, whenever his Majesty ſhould be pleaſed to call it; and he ſaid it was more evident, that *otherwiſe* he was an *Indefinite Priſoner*, and at the *King's Will only for his Liberty*, the Conſequences of which every man ought to lay to his heart with a dread of it, whenever they ſhould live under a Prince that might not be ſo merciful as our preſent King, and he hoped the Court would duly conſider it.

Beſides all this he ſaid, he durſt confidently affirm, *That there was not a Precedent ſince the Conqueſt, of any man's being refuſed Bayl under ſuch Circumſtances as his were:* Whereas he ſaid, the detaining of men under long Impriſonment, ought either to have *expreſs Law for it, or a good number of Precedents, and in good times to juſtifie it*, and not any ſingle Inſtance or two (if they could be produced) which he thought they could not.

And he hoped that Precedent which he had already mentioned on his Majeſties behalf, would be very well conſidered, which was; How the *King's* Court ſhould keep the *King's* Priſoner, and at the *King's* Sute, in the *King's* Priſon, with the *King's* Pardon, and againſt the *King's* Will, twice declared in that Court, by his Attorney General.

He ſaid he ſhould conclude with letting his Lordſhip know, that as the King himſelf had ſufficiently declared, that there was no danger in the letting him have his liberty, ſo he had ſuch Bayl to offer to his Lordſhip as would ſufficiently ſatisfie the World, that he ſhould be forthcoming to anſwer when and where that Court ſhould appoint, and then he hoped the two chief grounds for detention in a Priſon (*viz. The danger of a Mans having his liberty; and the danger of his not appearing to abide his Tryal*) would be fully anſwered.

And if it might not ſeem too great a vanity to ſay (although the true reaſon do's take away the vanity of it, becauſe it would not be for his, but for their own ſakes, as what may happen to be their own Caſes) he ſaid he doth believe, he could have the Major part of the Houſe of Lords to be his Bayl in this Caſe, and ſome of thoſe very Lords, who were for the making of this Order, although not in that ſenſe which would ſeem to be put upon it. In ſo much that there would be no more to fear in the Granting him Bayl, than he hoped there was either Reaſon or Juſtice to deny it. And he doubted not, but he was there before very juſt Judges, who would duly conſider what he had ſaid.

The Lord Chief Juſtice then ſpeaking did ſay, That the Earl of *Danby* had ſeemed to reflect upon the Court, as if they had denied him Juſtice in not hearing his Counſel.

Then the Earl of *Danby* deſired leave to interrupt his Lordſhip, ſaying, That his Lordſhip had miſtaken him, for that he had ſaid no

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ſuch thing of that Court, nor did he mean it of that Court; but ſaid, it was very well known that his Counſel had been forbid to plead for him in another place, which was then acknowledged by Juſtice *Jones* to be very true.

The Lord Chief Juſtice then proceeded, and ſaid, That for his Lordſhip's ſaying, they needed not to fear, becauſe he did believe the Greateſt part of the Lords would be his Bayl: That it was not the fear of another Court that had any kind of influence upon them, or that they ſhould do ſuch things as they feared to be called to an account for; but that they were to govern themſelves by the doing of Juſtice.

That they had heard his Lordſhip with a great deal of patience, and that he had ſaid many material things, and with much acuteneſs, and that they were not ſenſleſs of the hardſhip of his Lordſhips Caſe, and of the greatneſs of his ſufferings.

That they were likewiſe ſenſible of the Kings deſires that his Lordſhip ſhould have no longer Impriſonment than the Law requires; and he confeſſed *that the King had done as much as lay in his power.*

That it was not denied, becauſe that Court could not Bayl for Treaſon, *for that they had a power to Bayl in all Caſes whatſoever,* if the Court ſaw cauſe: Neither would the Indictment which was found againſt him about Sir *Edmond-Bury Godfrey* have hindred; *nor was it the Order of the Houſe of Lords which hindred them*; But that they were to act there according to Law, and he prayed his Lordſhip to conſider that they could not relieve him according to Law.

That he did agree to ſome things mentioned by his Lordſhip, and that it was a very hard Caſe he ſhould lye ſo long in Priſon; but here was the miſery, they could only compaſſionate him, for that his Lordſhip was impriſoned by an higher Hand, and where they had no power to intermeddle.

He inſtanced in Indictments for Treaſons, and ſeveral other great Crimes, in which they could Bayl men, but in this Caſe, *the Supream Juriſdiction of the Nation had laid their hands upon it, which was attended by the Houſe of Commons with an Impeachment.*

Whether their Lordſhips had cauſe, or not cauſe to commit his Lordſhip, they could not Inſpect; But that they ought to believe that his Lordſhip was juſtly Committed, and that their Lordſhips in their mature Deliberation would do nothing unjuſtly.

He ſaid, That they had a Juriſdiction over all the Courts in the Kingdom (that only excepted) *and as it would be very Incongruous for an Inferiour Court to Bayl whom they had Committed, or to call their Proceſſes in queſtion, ſo would it be in like manner for them to*

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*do in this Case*, becauſe the Lords exceed their Juriſdiction, and were above them: He ſaid alſo, That the Opinion of all the Judges in *England* had been taken therein, and had delivered their Opinions, that he could not be Bayled, and that the truth was, his Lordſhip was impriſoned by too high a Court for them to Bayl him: But that his Lordſhip *was not Indefinitely Impriſoned* as he had alledged; *for whenever his Majeſty is pleaſed to call a Parliament, his Lordſhip would have remedy.*

*That the King has power to do it when he pleaſes*; and for his Peoples good, no doubt he will when he ſees fit: But that at ſome time the Circumſtances of State differ from other times, and that it may not for ſome ſpace of time be thought convenient; and though this may prove miſcheivous to a ſingle Perſon, or to two or three Perſons, yet ſuch things muſt be endured for the good of the Publique. He ſaid alſo, *That if that Court ſhould commit a man for High Treaſon, and the King ſhould Adjourn them from time to time, that man could not be Bailed untill they ſat again:* So that he muſt confeſs (as his Lordſhip had ſaid) that as this Caſe did happen, he was under a *Temporary Indefinite Impriſonment.*

He concluded which telling his Lordſhip, *That he muſt be contended to wait the Kings pleaſure when he would call a Parliament.*

That for his part, he was before of Opinion that they could not Bayl his Lordſhip, and he was ſo ſtill.

The Earl of *Danby* to all this anſwered, that he muſt confeſs his Ears did tingle to hear his Lordſhip ſay, *That the King had done as much as lay in his power*; when his Majeſty is bound both by his Coronation Oath, and by the Laws, to ſee right done at all times to his Subjects, and he deſired to know *whether this was not the Kings Court, and whether he had not deputed a Power to them to ſee right done to all accordingly?*

He ſaid alſo, that he was now under greater amazement than before, ſince his Lordſhip had both granted, *That this Court could Bayl any Treaſon*, and *that the Order of the Houſe of Lords did not hinder it*; which till now he confeſt he had taken to be the only obſtruction to his Liberty.

That he had hoped he had ſatisfied his Lordſhip, that although he was Impriſoned by an higher hand, yet *that the Bayling of him did not intermeddle with the Juriſdiction of that higher Judicature*, and he had yet heard nothing to ſhew him that it did.

That for what his Lordſhip had ſaid of the Opinion of all the Judges in *England*, being taken in his Caſe, he muſt needs inform his Lordſhip, that That was a miſtake; for that the Opinion of the Judges had never been asked in his particular Caſe, ſaving once, upon his Petition-

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ing the King for Liberty to go to his Countrey Houſe at *Wimbledon*, with a Guard, or otherwiſe, as his Majeſty ſhould think fit; which Petition was referred by his Majeſty to the Judges; and they (according to their wanted prudence and caution) did only Report that they thought his Majeſty could not Legally grant the Petitioners requeſt.

That whereas his Lordſhip ſaid, That he was *not Indefinitely Impriſoned, for that whenever his Majeſty is pleaſed to call a Parliament, he will have remedy; and that he muſt be content to await the King's pleaſure when he will call a Parliament*; He took thoſe to be fuller Arguments than any himſelf had made, to prove *that his Impriſonment was Indefinite, and at the Kings pleaſure, ſo that he was now more fully confirm'd than ever to be of that Opinion, and wiſht that every man that heard that Doctrine given for Law, might fully conſider the conſequences of it.*

He ſaid further, that his Lordſhip had miſtaken him in thinking that he had ſaid he was under a *Temporary Indefinite Impriſonment*, for that he had ſaid he was under an *abſolute indefinite Impriſonment*; and that his Lordſhip had rather proved him to be ſo, than ſhewed any thing to the contrary; nor did he know what *Temporary Indefinite* did mean.

The Lord Chief Juſtice then ſaid, That he was not a Judge at that time when the Judges Opinions were asked, but deſired his Br. *Jones* to relate how it was.

Mr. Juſtice *Jones* then ſaid, That he remembred the Caſe had been put to the Judges, Whether the Lords in the *Tower* might be Bayled, and that it was then the Opinion of the Judges that they might not; but he ſaid he did think the Earl of *Danby* was not particularly concerned in the queſtion at that time, but that it related to the Popiſh Lords only, and that there was much difference betwixt his Lordſhips Caſe and theirs, Beſides he did think that was at a time when there was a day appointed for the meeting of a Parliament.

The Earl of *Danby* then ſaid, that the queſtion which was put at that time to the Judges about the Popiſh Lords, did not concern his caſe at all, for that it differed from theirs in very many particulars, which he had already mentioned, *viz.* Of no Oath againſt him, No ſpecial Treaſon alledged, &c. which he was loth to trouble them with Repeating again; but he ſuppoſed that the then Opinion of the Judges, ought not to be made any Argument againſt him.

He ſaid alſo, that the Lord Chief Juſtice had argued very ſtrongly for him; For that it was true, *That the King might call a Parliament when he pleaſed, but if therefore a Man muſt ſtay in Priſon till the King did pleaſe to do ſo, he may (by that very Argument) lye there all his life-time if the King pleaſes*; which confirm's what he

had been a great part of this time, labouring to prove; and he ſaid, he muſt confeſs he did expect to have heard ſtronger and more powerful Arguments to have convinc'd him that he was in the wrong in what he had ſaid; but that now he was more incourag'd than before, not to give over a Cauſe which did ſo much concern every Man in *England*.

The Lord Chief Juſtice then ſaid, that his Lorſhip was miſtaken in believing that That Court did keep him in Priſon, for that he was not kept in Priſon by them, but by a ſuperiour Court, which was too big for them to meddle with, or to examine what they did

To this his Lordſhip anſwered, That he had wrong done him, which muſt be done by ſome body, and that it was a Maxim of the Law, *That the King could do no man wrong* (being adviſed by his Courts) beſides, that his Majeſty had twice ſhew'd his Conſent in that Court to have him Bayl'd. Neither could he ſay, that the Lords did him wrong, becauſe there was nothing in their Order to hinder his being Bayled, (beſides their own practice to the contrary) and it ſeemed now to be ſaid, that it was by the Law, and not by the Order, that he was kept a Priſoner. He ſaid, he would not ſay that That Court did keep him a Priſoner, but by ſome body he was ſure he was kept Priſoner, but perhaps it might be by the Stars, ſince he could not find who it was upon Earth that did it.

He concluded that if he were legally Impriſon'd, yet by *Magna Charta* and the *Petition of Right* &c. It was impoſſible for an Engliſh Man to be without ſome *certain* proſpect of relief in a reaſonable time, they being to have Juſtice done them by the Law at all times, and without delay; and that he was now in the Kings proper Court for Juſtice, wherefore as his Lordſhip had given his own opinion, ſo he did deſire that every Judge would be pleaſed to deliver theirs ſeverally.

Then Mr. Juſtice *Jones* ſaid, that he was not ready to give any preſent Opinion, there having been ſo much, and ſome things ſo materially ſaid by his Lordſhip; but that for his better ſatisfaction he did deſire to ask his Lordſhip a queſtion, in a point which did much ſtick with him, and would go a great way in guiding his Judgment; and he was confident that his Lordſhip was as able to give him an anſwer to it as any Man; which was this, His Lordſhip (he ſaid) had been charg'd with Treaſon by an Impeachment, and had pleaded a Pardon to the Impeachment before the Lords; *He ſaid he took that Plea to be a Tacite Confeſſion of guilt in Law*, (though the Party were never ſo innocent) and then it had been *a Tacite pleading of Guilty*, inſomuch that he did believe, there could be no admittance of any Second Plea, and if ſo, he did confeſs he did not ſee how that Court could then have any thing to do with his Lordſhip in that Caſe; but it

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was what he had not yet well considered (though at present he took the Law to be so) and he did desire to hear what his Lordship did say to that?

His Lordship answered, that he gave him great thanks for letting him clear any Objections, and giving him liberty to answer them as well as he could. That this indeed was a question of Law, which he was but little vers't in, but that he was at present able to say, that he had read the Opinions of some great Men of the Law, to be otherwise; and instanced what the Lord *Coke* had said upon the Case of *Grauesend* Bishop of *London* 7. *E.* 3. who did get a Writ of Discharge to the *Kings Bench*, and did not take a Pardon, upon which he observed the said Lord *Coke* to have said. *That it may be he thought that the taking of a Pardon would have implied a confession of the fault, and therefore went a new way; but that was a mistake, for that no Man that is wise and well advised will refuse God and the Kings Pardon, how often so ever he may have it; for there is no Man but offendeth God and the King almost every Day, and the Pardon is the safest and surest way.*

And though at present he said he was not provided of Precedents in the Case, yet he remembred there was a Case of a Coyner tried at *Durham* upon a Pardon, where the Pardon proved defective, and yet he was allow'd to plead over.

And he told him, that the same question had been moved in the House of Lords upon his own Case, where divers Lords had declared themselves, *that they hoped it should never pass for Law amongst them, that a Man should not have one Plea for his Life, and gave for reason that if a Pardon was pleaded, and not admitted to be good, then the Prisoner had depended upon what he thought had been a good Plea, but was adjudged by the Court not to be so, and then if he should not be admitted to plead over, it would be to insnare a Mans Life, without giving him any Plea at all for it.* And he concluded, saying, he thought that this question was rather going into the Merits of his Cause, than to what he only demanded; which was but Bayl.

Mr. Justice *Dolben* then said he must acknowledge there was a vast difference betwixt his Lordships Case and the Case of the Popish Lords in the *Tower*, in many Material particulars, which his Lordship had mentioned, *and he must confess that he thought it one of the hardest Cases in England:* He said also, that he could not but differ from what his Br. *Jones* had said, as to the not having liberty to plead over, for that he was of Opinion his Lordship ought not to be debarred from having a second Plea, if the Pardon should be over-ruled, and if (I did not mistake him) he cited the instance of one *Hetleys* Case (or such a name) and he said that his Lordship had said so many things of great consequence, that he thought it did very well deserve further

ther consideration, but if he should be put to give any present answer, he must then say (as my Lord Chief Justice had done) that he thought they could not Bayl his Lordship, but he thought it might well deserve further consideration.

Mr. Justice *Raymond* then said, That his Lordships Case had so many weighty Circumstances in it, as ought to make it to be very well considered, before any Opinion could be delivered in it. That for what had been said by his Brother *Jones*, about the Pleading over or not, he thought that did not properly lye before them in that place, That his Lordship had said *some things, to which he thought full answers might be given*, but that he had also said *some things, to which he thought it would not be so easy to answer.* That for his part he thought it was a Case which might well deserve the consideration of more of the Judges, betwixt this and the next Term, and that he must acknowledge he must further consider it, before he would presume to give any Opinion at all upon it.

A Council at the Bar then moved, that a Rule of Court might be made to bring his Lordship thither again, the first day of the next Term.

The Lord Chief Justice seemed displeased with the forwardness of that Counsel, and the Earl of *Danby* Excused it, saying it was not moved by his desire or directions; but said, that was all one as to him, whether there were any Rule of Court or no, for that they were like to be troubled with him again, and that he should not easily give over a Cause, wherein he took the liberty of the Subject in General to be as deeply concern'd as himself, and wherein he had found so little to be said against him, that he did believe he should be as troublesome to them as ever Judge *Jenkins* had been heretofore in the defence of English Liberty.

The Lord Chief Justice then standing up said, My Lord, your Lordship must for the present be content to be remanded; and speaking to the Lieutenant of the *Tower's* Officer, told him, he must take back his Prisoner.

And then the Lord Chief Justice immediately left the Court.

FINIS.